STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS; RESPONSE TO MOTION TO SUPPRESS; RESPONSE TO MOTIONS IN LIMINE; AND REQUEST FOR EVIDENTIARY HEARING

Officers do not have to inform DUI suspects of their due process right to obtain an independent blood alcohol test unless the officers do not invoke the implied consent law to test the suspect's BAC. Officers do not need to advise a DUI suspect who refuses to submit to a test that the suspect has a right to an independent test. Although officers cannot quantify the degree of a defendant's intoxication absent a test, they can testify as to their training and experience in identifying signs of alcohol intoxication and can testify about what they observed. A defendant has no right to consult an attorney before performing field sobriety tests. HGN results are admissible in the same way as other field sobriety test results.

The State of Arizona, by and through undersigned counsel, requests the Court to deny the defendant's Motion to Dismiss. The State also asks this Court to deny the defendant's Motions in Limine to preclude the State from introducing an officer's opinion of defendant's impairment; to preclude the State from introducing evidence of the defendant's prior DUI convictions; and to preclude the State from introducing evidence of the defendant's blood alcohol level through HGN. The State opposes these motions based on the grounds and for the reasons set forth in the following Memorandum of Points and Authorities. The State also asks this Court to set an evidentiary hearing concerning the defendant's claim that he requested an independent blood test.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On July 1, 1993, Officer Hancock observed a 1992 Ford pickup truck driving at a speed of approximately 25 to 30 m.p.h. The pickup veered into the adjacent lane and back into the curb lane. Officer Hancock immediately attempted to stop the truck by using his overhead lights. The pickup slowed down, made a wide right turn, and failed to stop, continuing to travel at 10 to 15 m.p.h. Officer Hancock then gave a short burst of

his siren, but the pickup still failed to stop. The officer then turned his siren on and left it on, and the pickup finally pulled over.

Officer Hancock asked the driver, defendant Curtis Oliver, why he had not pulled over. The defendant said he was sorry. Officer Hancock smelled a strong odor of intoxicating liquor on the defendant's breath from three feet away. The defendant's eyes were watery and bloodshot. Officer Hancock asked the defendant to get out and walk to the back of the truck. The defendant did so with much difficulty; he had to lean on the truck to keep his balance. Officer Hancock then administered the Standard Field Sobriety Tests, including HGN, and arrested the defendant for DUI.

At this point the defendant pleaded with the officer not to arrest him and asked why he did not have an opportunity to call an attorney before taking the sobriety tests. Officer Hancock explained that at the time the defendant was performing the field sobriety tests, the defendant was not under arrest. Officer Hancock also told the defendant that no one would ask him any questions about the offense and that if he wanted to, he could call an attorney as soon as the DUI van arrived.

When the DUI van arrived, Officer Hancock informed Officer Crane that the defendant wished to call an attorney. The officers allowed the defendant to use a cellular telephone to contact an attorney at 10:30 p.m. Officer Crane then advised the defendant of his *Miranda* rights and made sure that he knew he was under arrest; the defendant said that he understood his rights and knew that he was under arrest.

Officer Crane then explained the implied consent law to the defendant and asked him if he would take a breath test. The defendant did not answer. He asked Officer Crane to explain the law again, and Officer Crane did. The defendant still refused to say

yes or no. Officer Crane explained the implied consent law several additional times and the defendant continued to refuse to say whether or not he would take a breath test. Officer Crane then told the defendant that any further delay would constitute a refusal. Again, the defendant would not say yes or no and asked if he could wait for his friend to arrive. Officer Crane told the defendant that this would not be possible. Finally, the breath-testing machine "timed out" with no sample taken. The State did not obtain a sample of the defendant's breath for testing.

The defendant has been charged with Aggravated DUI.

The defendant claims that while he was in the DUI van, he requested an independent blood test. However, none of the three officers involved mentioned any such request in the Departmental Report. This Court will therefore need to hold an evidentiary hearing to determine whether the defendant actually requested an independent test.

LAW:

I. Response to Motion to Dismiss

A. The State was not required to advise the defendant of his right to an independent blood alcohol test.

The defendant argues that this Court must dismiss the charge against him because the police failed to advise him of his right to obtain an independent test of his blood alcohol content. However, the Arizona courts have consistently held that when police invoke the implied consent law, the police are not obliged to inform DUI suspects of their right to independent testing. *State v. Superior Court*, 179 Ariz. 343, 345, 878 P.2d 1381, 1383-83 (App. 1994). In that case, the Court of Appeals said, "We have consistently held that police are not obliged to inform DUI suspects of their right to

independent testing." The Court of Appeals further explained that the only Arizona case that has ever found any duty to inform was *Montano v. Superior Court*, 149 Ariz. 385, 719 P.2d 271 (1986). However, *Montano* "involved a unique situation where the arresting officers did not have access to a breathalyzer and did not invoke implied consent." The Court noted that *Montano* had consistently been limited to its facts, citing *State v. Miller*, 161 Ariz. 468, 470, 778 P.2d 1364, 1366 (App. 1989) [*Montano* does not apply where the police have invoked the implied consent law] and *State v. Ramos*, 155 Ariz. 153, 154, 745 P.2d 601, 602 (App. 1987) [In cases outside the limited circumstances of *Montano*, police officers are under no obligation to inform a DUI suspect of his right to have an independent blood alcohol test done). The Court of Appeals concluded, "Indeed, in *Ramos* we stated: 'Absent the unique conditions in *Montano*, no Arizona court has ever held that a DWI suspect must be told of his right to an independent test.' *Id*. at 155, 745 P.2d at 603." *State v. Superior Court*, 179 Ariz. 343, 345-46, 878 P.2d 1381, 1383-83 (App. 1994). Based on these cases, the State has no obligation to advise a defendant of his right to obtain an independent test if the implied consent statute is invoked.

Whether or not the State invokes the implied consent statute, under A.R.S. § 28-1321, a DUI suspect has a due process right to obtain an independent blood test at the suspect's own expense to refute the State's evidence. *Mack v. Cruickshank*, 196 Ariz. 541, 546 ¶ 14, 2 P.3d 100, 105 (App. 1999). But officers are not always required to advise defendants of that right. Although officers ordinarily advise DUI suspects of their right to an independent test, "officers are only required to do so if they do not invoke the implied consent law to test the suspect's BAC." *Id*. "Moreover, law enforcement officers

need not so advise a DUI suspect who refuses to submit to a test." *Id*. Due process does not require police to inform DUI suspects of their right to procure an independent blood alcohol test when implied consent has been invoked. In this defendant's case, the State did indeed invoke implied consent; therefore, the State was not required to advise the defendant of his right to an independent blood test and there has been no due process violation. Therefore, the defendant is not entitled to dismissal, and the State asks this Court to deny the motion to dismiss.

B. The State did not interfere with the defendant's opportunity to obtain an independent test.

The defendant next alleges that he is entitled to have the charge dismissed because he requested an independent blood sample, but the State prohibited him from obtaining an independent test. The State may not "unreasonably interfere with a suspect's opportunity to obtain an independent test by holding a suspect incommunicado for the crucial period during which the suspect's alcohol, if any, dissipates." *Mack v. Cruikshank*, 196 Ariz. 541, 546 ¶ 15, 2 P.3d 100, 105 (App. 1999). Thus, the State may not ignore a suspect's request to post bail, knowing that the suspect has sufficient funds immediately available to post bail. *State ex rel. Webb v. Tucson City Court*, 25 Ariz. App. 214, 542 P.2d 407 (1975). Nor may the State unduly delay a suspect's posting bail for release to obtain an independent test. *Smith v. Ganske*, 114 Ariz. 515, 562 P.2d 395 (App. 1977). And the State may not refuse to allow a suspect in custody to contact an attorney to arrange for an independent test. *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982).

The defendant has not shown that the State interfered with his ability to have an independent blood test performed. Because the defendant called an attorney from the

DUI van, he clearly was not denied his right to contact an attorney. Later, the defendant was booked into the Madison Street Jail. During the booking process, he was placed in a holding tank with a charge-a-call telephone. While at the jail, the defendant did not ask for an independent test, nor did he place any telephone calls to obtain such a test. The State did not interfere with the defendant's ability to have an independent test performed. Any failure to have a test performed lies squarely with the defendant, not with the officers or the jail. Therefore, the defendant is not entitled to a dismissal.

II. Response to Motion to Suppress

The defendant was not entitled to an attorney before performing field sobriety tests; therefore, he is not entitled to suppression of his statements made during those tests.

The defendant further alleges that he was denied an attorney prior to the field sobriety testing and that therefore his statements to police during that testing should be suppressed. Because field sobriety tests are not testimonial or communicative, they do not violate the Fifth Amendment and police need not give suspects *Miranda* warnings before administering such tests. *State v. Lee*, 184 Ariz. 230, 233, 908 P.2d 44, 47 (App. 1995). A subject who has been stopped temporarily and asked to submit to field sobriety testing is not considered to be "in custody" for purposes of *Miranda*. *State v. Rodriguez*, 173 Ariz. 450, 455, 844 P.2d 617, 622 (App. 1992), citing *Pennsylvania v. Bruder*, 488 U.S. 9, 109 S.Ct. 205, 102 L.Ed.2d 172 (1988). In *Bruder,* the United States Supreme Court held that, although a traffic stop is unquestionably a seizure within the meaning of the Fourth Amendment, such stops are typically brief, unlike a prolonged station-house interrogation. Second, the Court emphasized that traffic stops commonly occur in the "public view," in an atmosphere far less police-dominated than those in the

kinds of interrogation at issue in *Miranda*. Accordingly, the defendant was not entitled to a recitation of his constitutional rights prior to arrest, and his roadside responses to question were admissible.

III. Response to Motions in Limine

A. Officer's Opinion of Defendant's Impairment

The defendant has asked this Court to preclude the State from presenting the officers' opinions about whether the defendant was impaired. It is proper to ask officers if they are familiar with the signs of intoxication and to ask if the defendant displayed those signs. *State v. Lummus*, 190 Ariz. 569, 571, 950 P.2d 1190, 1192 (App. 1997), citing *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1984). The State will not have the officers estimate the degree to which they believed the defendant to be intoxicated. Rather, the officers will testify that they smelled alcohol on the defendant's breath; that his eyes were watery and bloodshot; that he was unsteady on his feet and had difficulty standing or maintaining his balance; and that he refused the breath test. All of this evidence is properly admissible; therefore, the State asks this Court to deny the defendant's motion in limine.

B. Evidence of the Defendant's Prior DUI convictions

The defendant has asked this Court to preclude the State from introducing any evidence of his prior DUI convictions, claiming that such evidence has no probative value and is unfairly prejudicial. However, the defendant has been charged with Aggravated DUI in violation of A.R.S. § 28-1383. The crime of Aggravated DUI requires proof that a person drove while intoxicated while the person's driver's license or privilege to drive was suspended, canceled, revoked or refused, or while his license or

privilege to drive was restricted. Thus, the State must prove that the defendant knew or should have known that his driver's license was suspended.

In *State ex rel. Romley v. Galati*, 195 Ariz. 9, 985 P.2d 494 (1999), *cert. denied*, 528 U.S. 1161 (2000), a defendant stipulated to prior convictions that were elements of the charged offense of aggravated DUI. The trial judge ordered a bifurcated trial and submitted only the remaining elements of the offense to the jury, thus withholding knowledge of the defendant's prior convictions from the jury. The Arizona Supreme Court held that a trial judge cannot bifurcate a trial when doing so precludes a jury from considering prior convictions that are elements of a charged offense. The Court reasoned that the jury's role is to determine whether the State has proved each element of the charged offense beyond a reasonable doubt, and stated, "That obligation cannot be delegated, in part, to the trial judge. See *State v. Powers*, 154 Ariz. 291, 293, 742 P.2d 792, 794 (1987) (a jury must determine the existence of all elements of a crime beyond a reasonable doubt)." *State ex rel. Romley v. Galati*, 195 Ariz. at 11 ¶ 12, 985 P.2d at 496. Therefore, the Court cannot take the issue of the defendant's prior convictions from the jury.

The State will not introduce evidence in its case in chief that the defendant was previously convicted of DUI; however, the State will present evidence that the defendant was notified that his privilege to drive was suspended or restricted. This evidence is relevant and admissible to prove an element of the case; therefore, this Court should deny the defendant's motion in limine and allow the State to present this evidence.

C. HGN Expert Testimony

In this case, the defendant refused to take a breath test but field sobriety tests were administered which included HGN. The Arizona Supreme Court *in State ex rel Hamilton v. City Court [Lopresti, Real Party in Interest]*, 165 Ariz. 514, 518-19, 799 P.2d 855, 859-60 (1990), set forth the foundational requirements for HGN in similar cases when it stated:

> In a case involving only a § 28-692(A) [now § 28-1381(a)] charge, where no chemical test of blood, breath, or urine has occurred, the use of HGN evidence is restricted. Evidence derived from the HGN test, in the absence of a chemical analysis, although relevant to show whether a person is under the influence of alcohol, is only relevant in the same manner as are other field sobriety tests and opinions on intoxication. In such a case, HGN test results may be admitted only for the purpose of permitting the officer to testify that, based on his training and experience, the results indicated possible neurological dysfunction, one cause of which could be alcohol ingestion. The proper foundation for such testimony, which the State may lay in the presence of the jury, includes a description of the officer's training, education, and experience in administering the test and a showing that the test was administered properly. The foundation may not include any discussion regarding the accuracy with which HGN test results correlate to, or predict, a BAC of greater or less than .10%.

The State is well aware of the limitations set forth in *Lopresti* and will only offer evidence that falls within the parameters of that case.

CONCLUSION:

For the foregoing reasons, the State requests that this Court deny the defendant's motion to dismiss and motions in limine. The State also requests that this Court set an evidentiary hearing to determine the validity of the defendant's claim that he requested an independent blood alcohol test.